2682

No. 2622.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

H. C. AMES,

Plaintiff in Error,

vs.

JERRY SULLIVAN,

Defendant in Error.

ERROR TO THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, SECOND DIVISION.

BRIEF OF DEFENDANT IN ERROR.

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San Francisco

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STATEMENT.

Defendant in error has nothing of importance to complain of in connection with the statement of facts of plaintiff in error in his brief, except as to the statement on page 8 of the brief to the effect that H. C. Ames, plaintiff in error "described fully and accurately the location of the Kshunti Fraction."

From the record made, it is most uncertain where the boundaries of the Kshunti Fraction were, though according to the location notice (Tr., 89) the claim contained about eighteen acres and its lower end joined the upper end of the claim known as Number 31 above

Allen's Discovery. In the testimony of Ames (Tr., 107) he stated:

> "At the time I located the Kshunti Fraction, I did not know that the location of that identical ground was recorded in the name of Windquist. I did not at that time know there was any number 32. I was told by the man who was there and helping locate these claims that there was no 32."

And again (Tr., 106):

> "I knew that Tom Evans had located Number 8. I had never heard that Evans and Methe had located Number 32. I knew they had located up as far as Number 31. I thought they had left Number 32 vacant."

And again (Tr., 88):

> "The upper corner of Number 31 was at my initial stake."

The testimony of Methe and Evans, witnesses for defendant below, was to the effect that the lower end of Claim 32 joined the upper end of Claim 31.

Defendant in error calls the court's particular attention to this testimony because in spite of this testimony, it is claimed by plaintiff in error that between the upper end of Claim 31 and the lower end of the Kshunti Fraction, there was a fractional portion of defendant in error's Claim 32 upon which defendant in error might have performed the annual labor for 1912, even though the representative of defendant in error had been by plaintiff in error thrown off of the portion of Claim 32 covered by the Kshunti Fraction. To

make this claim good, it is shown by plaintiff in error (Tr., 108) that *after the commencement of this litigation* at the suggestion of plaintiff in error one Mike Nevins located the Bull Head Fraction out of the lower portion of defendant in error's Claim 32.

SPECIFICATION OF ERRORS.

Plaintiff in error in his brief discusses only the third and fourth errors specified and defendant in error will therefore confine his argument within the same limits.

The third error specified is the admission in evidence by the lower court of plaintiff's "Exhibit C," being a letter written by Gus Johnson to N. O. Windquist, predecessor in interest of defendant in error in the mining claim in controversy, the letter describing the ejectment of Johnson from the claim by plaintiff in error, Johnson at the time being on the claim attempting to perform the annual labor for Windquist.

The fourth error specified is the refusal of the lower court to permit the filing of an amended and supplemental answer after the testimony was in and before the case was submitted to the jury, the amendment offered alleging the forfeiture to the United States of defendant in error's mining claim for failure to do assessment work on the claim in 1911 and also in 1912. No point is made in plaintiff in error's brief as to the work for 1911. Discussion herein is therefore confined to the annual labor for 1912.

ARGUMENT.

I.

AS TO THE ADMISSION OF THE LETTER PLAINTIFF'S EXHIBIT "C."

The letter was properly admitted on the question of the failure to do the annual labor for 1912.

This issue was not raised by the pleadings but by the plaintiff in error on the taking of testimony.

It appeared on the trial below that the plaintiff there had not performed the annual labor for 1912 on his claim. The suit was begun in April, 1912. The plaintiff met this issue by showing that he was forcibly prevented by defendant from doing the work.

The testimony of both plaintiff and defendant was that plaintiff's agent was forcibly prevented from doing the annual labor at the place he had selected to do it.

It was *to describe this forcible prevention* and the occurrences in connection with it that *the letter was written,* by the man attempting to do the work, to the owner of the claim; *and the letter was written at the time* the forcible prevention occurred.

The evidence in the case was conflicting as to the making of the locations of the claims, but on the question of the forcible prevention of the performance of the labor the evidence was all one way. It was on this issue that the letter was used. Its admission could not have possibly affected the verdict.

Leedy v. *Lehfeldt,* 162 Fed., 304, cited by plaintiff in error on this point, is easily distinguished from the case at bar.

There the question was the priority of location. A miner living in a cabin some distance from the claim in controversy testified that at 2 o'clock on the morning in question he awoke to find a scrap of paper upon his table upon which was written by some one: "2.00 a. m. Happy New Year from No. 9 Otter Creek." This note was allowed to go in as evidence that plaintiff in the case had been in the neighborhood of the claim on New Year's morning. There was no testimony that the note was written by plaintiff or that he was at the cabin. The evidence was nearly evenly balanced and this court reversed the case because of the error committed in admitting the note in evidence.

Here the writing of the letter was of the *res gestae* of the ejection of plaintiff's agent from the claim to prevent his doing the assessment work thereon, and was written at the time of the ejection by the witness on the stand testifying at the time of its introduction, who was also the agent who was ejected.

The evidence as to the forcible prevention of the doing of the annual labor for 1912 is more fully discussed and set forth under the next heading.

II.

AS TO THE REFUSAL OF THE COURT TO PERMIT THE FILING OF AN AMENDED AND SUPPLEMENTAL ANSWER.

It is true that as to the question of the location of the claims, the evidence is conflicting, but as to the failure to do the annual labor, there is no conflict. All witnesses agree that Johnson, who was doing the work for the defendant in error, was forcibly prevented from doing it. The only contention of plaintiff in error on this point is that though Johnson was thrown off the portion of defendant in error's claim in conflict with the claim of plaintiff in error, it was still the duty of Johnson to find some spot not in conflict and there do the annual labor, and it is further claimed that plaintiff in error could take advantage in this case of a forfeiture resulting from Johnson's failure to do this.

If such a contention has any force it is lost by the absolute failure here to show that the labor could have been done at any place outside of the conflicting lines with any benefit to defendant in error's claim. The law requiring annual labor not only requires the labor to be done, but that it be done for the development and improvement of the claim, so that if the answer had been amended in accordance with the motion of plaintiff in error, the clear duty of the court below would

have been to instruct the jury to find against the plaintiff in error on the issue thus raised.

The manner in which the annual labor was prevented was as follows: Johnson attempted to do the work at the same place on the claim (Tr., 94) on which he had done it the year before, and went there with another man for this purpose, and had actually performed some of the work when the plaintiff in error by strategy, having securely locked Johnson's helper in a house, proceeded to drive Johnson off the claim and thus himself described the affair (Tr., 98):

> "Coming from Broste's cabin, they had to pass my cabin within a couple of hundred feet. I had a conversation with them when they came up the second day. I went out and asked Mr. Broste to come over to the house, that I wanted to talk to Johnson privately. He came over to the house and I, after he came in the house, went out and I had the lock on the outside of the door, and I snapped the lock so as to be sure he would not come out. I had ordered them off the day before and they would not go. I thought one man was better to put off than two, that is the reason I locked him in the house, and I went over there and drove Cayuse Johnson off the claim."

Johnson's description was in part as follows (Tr., 51):

> "It was in the fall of the year 1912 that I attempted to do the assessment work on No. 32 in November. Ed. Broste was with me. We worked one day close to the line of the Kshunti Fraction, and the next day Ames would not let us work. The

conversation between Ames and I took place on No. 32, in the hole where I was working. He told me to get out of there, that he would see that I did get out, and took hold of me. I wrote Windquist about that affair."

The letter which Johnson wrote appears on page 52 of the transcript, and then his further description of his ejectment:

"Mr. Ames tried to hit me twice when he put me off the claim. Broste was down in Ames' cabin. He could not get out because he was locked in."

In *Mills* v. *Fletcher,* 100 Cal., 142, 148, the court said:

"The defendants should not be heard to object that plaintiffs in error did not do the annual labor required by law during the year 1890, or any subsequent year while they remained in adverse possession and occupied the only tunnel that was open to the lode and through which plaintiffs in error intended to work. Conceding that plaintiffs in error might have been permitted by defendants to do work on the surface of their claims, there is no evidence that such work or any work outside of the tunnel occupied by defendants would have tended to improve or develop either claim, or could have been done to any advantage whatever, and if not, such work would not have answered the purpose of the law requiring annual labor."

Plaintiff in error could not forcibly prevent the doing of the annual labor by defendant in error and

then ask the court to give him the claim as a reward for his wrongdoing.

Erhardt v. *Boaro,* 113 U. S., 527.

Nor could plaintiff in error insist that defendant in error do the annual labor on the Bull Head fraction claimed by Mike Nevins which, according to the testimony of plaintiff in error himself, occupied all of defendant in error's claim except that covered by the Kshunti Fraction (Tr., 108).

No forfeiture could have occurred on account of the failure to perform the annual labor for 1912.

This because the Alaska legislature has passed a relief act which prevents the forfeiture by owners of mining claims in that territory for failure to perform the assessment work during the year 1912, where rights of other parties had not vested before the passage of the relief act in April, 1915.

The Act of Congress of March 2, 1907, appears at page 153, Section 162, Chapter 10, Title 4 of the Compiled Laws of Alaska and provides:

> "Upon failure of the locator or owner of such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had been made."

In *Thatcher* v. *Brown,* 190 Fed., 708, decided by this court in 1911, it was held that a failure to do the annual labor within the calendar year, worked a forfeiture of the claim to a person relocating the claim, though the original locator had resumed work on the claim before the relocation was made.

An act of the Alaska legislature approved April 29, 1915, and appearing at page 144 of the Session Laws of Alaska for 1915, provides that no forfeiture under said Section 162 shall result from the failure to do the annual labor within the calendar year unless intervening rights have vested and accrued, and the operation of said section 162 is held in abeyance until December 31, 1915. The language of the act is as follows:

> "Section 1. That that part or portion of said Section 162 reading as follows: 'And upon failure of the locator or owner of such claim to comply with the provisions of this Act as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had been made,' be and the same hereby is, amended to read as follows: 'And upon failure of the locator or owner of such claim to comply with the provisions of this Act, as to performance of work and improvements, the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made; Provided no forfeiture shall be declared or enforced against any placer or lode mining claim in the Territory of Alaska on account of failure heretofore to perform the annual labor or improvements required by law within any one calendar year, or on account

of the failure to file any affidavit or certificate of labor required by law; Provided, that the person, firm or corporation previously owning said mining claim shall have been in the possession of the same on or before the first day of April, in the year 1915, either during or subsequent to any such calendar year, unless intervening rights have vested and accrued to any such mining claim.

"Provided, That this Act shall not be construed to relieve the owner of any mining claim from any forfeiture declared by law, which may accrue after the 31st day of December, 1915.

"Section 2. All acts and parts of acts in conflict herewith are expressly repealed.

"Section 3. This bill shall take effect from and after its passage.

"Approved, April 29, 1915."

Thus it would appear that if it was error to refuse the request to file the amended and supplemental complaint, no good can come from reversing the case on this point, for under the law as it now stands no forfeiture occurred on account of the failure to perform the annual labor in 1912, on the claim in question, and the case of *Thatcher* v. *Brown, supra,* does not apply under the law as it now is.

Respectfully submitted,

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